

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEVIN SHAY, on behalf of ROBERT
M. SHAY,

Plaintiff,

V.

MICHAEL J. ASTRUE, Commissioner
of the Social Security Administration,

Defendant.

CASE NO. 11cv5622-BHS-JRC

REPORT AND RECOMMENDATION ON PLAINTIFF'S COMPLAINT

Noting Date: October 19, 2012

This matter has been referred to United States Magistrate Judge J. Richard
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
271-72 (1976). This matter has been fully briefed (see ECF Nos. 16, 17, 18).

The ALJ committed legal error by not documenting application of the special procedure required for evaluating mental impairments, despite the presence of multiple mental impairments, such as bipolar disorder, anxiety and substance abuse disorder. The

1 ALJ also committed harmful legal error by failing to provide germane reasons for her
2 failure to credit fully lay evidence. For these reasons, this matter should be reversed and
3 remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for
4 further consideration.

5 BACKGROUND

6 The underlying social security matter involves the disability claim of ROBERT M.
7 SHAY (hereinafter “Shay”), who was fifty one years old on his amended alleged date of
8 disability onset of January 29, 2003 (Tr. 30-31). Shay had a work history as a sales
9 manager and owner of a laundromat (*see* Tr. 34, 47, 131). Shay indicated that he could
10 “work as little or as much as [he] wanted,” due to his ownership status and due to the fact
11 that the “laundry mat [wa]s self-ran as long as the machines worked” (*see* Tr. 116).
12 Plaintiff had at least the medically determinable impairments of “bipolar disorder,
13 anxiety, substance abuse disorder, and degenerative disc disease” (*see* Tr. 19).

15 PROCEDURAL HISTORY

16 Shay protectively filed an application for Social Security disability insurance
17 benefits on June 3, 2008 (*see* Tr. 16, 98-99). His application was denied initially and
18 following reconsideration (Tr. 16, 52-54, 62-64). Shay requested a hearing on his denial,
19 and his son substituted for him on his appeal after Shay passed away on May 16, 2009
20 (*see* Tr. 16, 27-49).

21 Shay’s son, Mr. Kevin Shay, testified at an administrative hearing before
22 Administrative Law Judge Janis Estrada (“the ALJ”) on January 5, 2010 (*see* Tr. 27-49).
23 On February 16, 2010, the ALJ issued a written decision in which she found that Shay
24

1 was not disabled pursuant to the Social Security Act from his amended alleged date of
2 disability onset of January 29, 2003 until his date last insured of June 30, 2004 (*see* Tr.
3 16-22). She found that Shay did not have any severe impairments at step two in the
4 sequential disability evaluation process (*see* Tr. 19). On June 10, 2011, the Appeals
5 Council denied the request for review, making the written decision by the ALJ the final
6 agency decision subject to judicial review (Tr. 1-3). *See* 20 C.F.R. § 404.981.

7 On August 15, 2011, plaintiff, KEVIN SHAY on behalf of ROBERT M. SHAY,
8 attached the complaint in this matter to his petition to proceed *in forma pauperis* (*see*
9 ECF Nos. 1, 5). Defendant filed the sealed administrative transcript regarding this matter
10 (“Tr.”) on January 23, 2012 (*see* ECF Nos. 11, 13). In his Opening Brief, plaintiff
11 contests, among other things, the ALJ’s review of (1) the medical evidence regarding
12 Shay’s mental impairments; and (2) the lay testimony (*see* ECF No. 16, pp. 1-10).

14 STANDARD OF REVIEW

15 Plaintiff bears the burden of proving disability within the meaning of the Social
16 Security Act (hereinafter “the Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
17 1999); *see also Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines
18 disability as the “inability to engage in any substantial gainful activity” due to a physical
19 or mental impairment “which can be expected to result in death or which has lasted, or
20 can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C.
21 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff’s
22 impairments are of such severity that plaintiff is unable to do previous work, and cannot,
23 considering the plaintiff’s age, education, and work experience, engage in any other

1 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
 2 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

3 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 4 denial of social security benefits if the ALJ's findings are based on legal error or not
 5 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 6 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 7 1999)). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
 8 such "relevant evidence as a reasonable mind might accept as adequate to support a
 9 conclusion." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*
 10 *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see also Richardson v. Perales*, 402 U.S.
 11 389, 401 (1971).

13 In addition, the Court must independently determine whether or not "the
 14 Commissioner's decision is (1) free of legal error and (2) is supported by substantial
 15 evidence." *See Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing Moore v.*
 16 *Comm'r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)); *Smolen v. Chater*,
 17 80 F.3d 1273, 1279 (9th Cir. 1996); *see also U.S. v. Levy*, 391 F.3d 1327, 1335 (11th Cir.
 18 2004) ("the issue is not whether this Court has the power to consider issues not raised in
 19 the initial brief; of course it does").

20 According to the Ninth Circuit, "[l]ong-standing principles of administrative law
 21 require us to review the ALJ's decision based on the reasoning and actual findings
 22 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the
 23 adjudicator may have been thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1226-27

1 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation
 2 omitted)); *see also Molina v. Astrue*, 2012 U.S. App. LEXIS 6570 at *42 (9th Cir. April
 3 2, 2012) (Dock. No. 10-16578); *Stout v. Commissioner of Soc. Sec.*, 454 F.3d 1050, 1054
 4 (9th Cir. 2006) (“we cannot affirm the decision of an agency on a ground that the agency
 5 did not invoke in making its decision”) (citations omitted). For example, “the ALJ, not
 6 the district court, is required to provide specific reasons for rejecting lay testimony.”
 7 *Stout, supra*, 454 F.3d at 1054 (*citing Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.
 8 1993)).

9

DISCUSSION

10 Step-two of the Social Security Administration’s sequential disability evaluation
 11 process requires the ALJ to determine whether or not the claimant “has a medically
 12 severe impairment or combination of impairments.” *Smolen v. Chater*, 80 F.3d 1273,
 13 1290 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii)
 14 (1996). Although the ALJ here indicated initially that plaintiff’s medically determinable
 15 impairments were severe, the ALJ relied on a finding that Shay “did not have a severe
 16 impairment or combination of impairments” in order to support her ultimate conclusion
 17 regarding Shay’s disability status (*see* Tr. 19, 22). Thus, the sequential disability
 18 evaluation process ended at step two.

19 According to Social Security Ruling 96-3b, “[a] determination that an individual’s
 20 impairment(s) is not severe requires a careful evaluation of the medical findings that
 21 describe the impairment(s) (*i.e.*, the objective medical evidence and any impairment-
 22 related symptoms), and an informed judgment about the limitations and restrictions the
 23

1 impairments(s) and related symptom(s) impose on the individual's physical and mental
2 ability to do basic work activities." SSR 96-3p, 1996 SSR LEXIS 10 at *4-*5 (*citing* SSR
3 96-7p); *see also Slayman v. Astrue*, 2009 U.S. Dist. LEXIS 125323 at *33-*34 (W.D.
4 Wa. 2009). If a claimant's impairments are "not severe enough to limit significantly the
5 claimant's ability to perform most jobs, by definition the impairment does not prevent the
6 claimant from engaging in any substantial gainful activity." *Bowen, supra*, 482 U.S. at
7 146. Plaintiff bears the burden to establish by a preponderance of the evidence the
8 existence of a severe impairment that prevented performance of substantial gainful
9 activity and that this impairment lasted for at least twelve continuous months. 20 C.F.R.
10 §§ 404.1505(a), 404.1512, 416.905, 416.1453(a), 416.912(a); *Bowen, supra*, 482 U.S. at
11 146.

13 **1. The ALJ failed to evaluate properly Shay's mental impairments.**

14 The Social Security Regulations set forth a specific procedure for evaluating
15 mental impairments. 20 C.F.R. § 404.1520a(a). This procedure applies "at each level in
16 the administrative review process," including the ALJ's written decision issued after a
17 hearing. *See id.* According to this procedure, the ALJ first must determine whether or not
18 a medically-determinable mental impairment exists by evaluating the relevant symptoms,
19 signs and laboratory findings. 20 C.F.R. § 404.1520a(b)(1); *see also* 20 C.F.R. §§
20 404.1508, 404.1528. In a case where an Administrative Law Judge found that a claimant
21 had a mental impairment, but that it was not severe, the Ninth Circuit concluded that the
22 ALJ committed legal error by failing to document application of the special procedure
23

1 required for evaluating mental impairments. *See Keyser v. Comm'r SSA*, 648 F.3d 721,
 2 726 (9th Cir. 2011); *see also* 20 C.F.R. § 404.1520a.

3 Once it is determined that a mental impairment exists, the ALJ must rate the
 4 degree of functional limitation resulting from the impairment. 20 C.F.R. §
 5 404.1520a(b)(2). The regulations require the ALJ to include specific findings as to the
 6 degree of limitation in specific areas, including activities of daily living; social
 7 functioning; concentration, persistence or pace; and episodes of decompensation. *See* 20
 8 C.F.R. § 404.1520a(c)(3). As quoted by the Ninth Circuit, the ALJ's written decision
 9 “‘*must* incorporate the pertinent findings and conclusions based on the technique,’ and
 10 ‘*must* include a specific finding as to the degree of limitation in each of the functional
 11 areas.’” *See Keyser, supra*, 648 F.3d at 725 (quoting 20 C.F.R. § 404.1520a(e)(4))
 12 (emphases added by Ninth Circuit).

14 Here, the ALJ did not discuss explicitly her findings regarding social functioning
 15 or her findings regarding concentration, persistence or pace, although she appeared to
 16 find that any functional limitations in these areas were mild at most (*see* Tr. 21). In
 17 addition, the ALJ failed to discuss lay evidence provided by Shay's son specifically
 18 regarding Shay's concentration, persistence or pace, although she discussed information
 19 from the relevant testimony, and she likewise failed to discuss his testimony regarding
 20 Shay's social functioning (*see* Tr. 36 (“He had trouble focusing on a lot of stuff”); Tr. 39
 21 (“we had to call the medics because he was just in a state of delusion he thought
 22 people were out to get him”); Tr. 40 (“He didn't really coagulate with people in public .
 23 . . . he would be just kinda rude to people say kinda like off put things”)).

1 The lay evidence regarding the severity of plaintiff's mental impairments is
 2 significant probative evidence that the ALJ should not have rejected without discussion.
 3 In addition, federal regulations require the use of a special procedure when evaluating
 4 mental impairments. *See* 20 C.F.R. § 404.1520a. An ALJ commits harmful legal error by
 5 failing to document adequately the application of the special procedure required for
 6 evaluating mental impairments. *See Keyser, supra*, 648 F.3d at 726.

7 The error is harmful here as the ALJ relied on her finding that Shay did not have
 8 any severe mental or physical impairment in order to conclude that Shay was not disabled
 9 and she failed to document adequately her determination that Shay's mental impairments
 10 imposed no more than a minimal effect on his ability to work. Therefore, this matter
 11 should be reversed and remanded to the Commissioner for further administrative
 12 proceedings regarding Shay's mental impairments and the severity thereof.

14 **2. The ALJ failed to evaluate the lay evidence properly and failed to provide
 15 germane reasons for the failure to credit it fully.**

16 Pursuant to the relevant federal regulations, in addition to "acceptable medical
 17 sources," that is, sources "who can provide evidence to establish an impairment," *see* 20
 18 C.F.R. § 404.1513 (a), there are "other sources," such as friends and family members,
 19 who are defined as "other non-medical sources," *see* 20 C.F.R. § 404.1513 (d)(4), and
 20 "other sources" such as nurse practitioners, who are considered other medical sources,
 21 *see* 20 C.F.R. § 404.1513 (d)(1). *See also Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217,
 22 1223-24 (9th Cir. 2010) (*citing* 20 C.F.R. § 404.1513(a), (d)); Social Security Ruling
 23
 24

1 “SSR” 06-3p, 2006 SSR LEXIS 5, 2006 WL 2329939. An ALJ may disregard opinion
 2 evidence provided by “other sources,” characterized by the Ninth Circuit as lay
 3 testimony, “if the ALJ ‘gives reasons germane to each witness for doing so.’ *Turner*,
 4 *supra*, 613 F.3d at 1224 (citing *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)); see
 5 also *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). This is because “[i]n
 6 determining whether a claimant is disabled, an ALJ must consider lay witness testimony
 7 concerning a claimant's ability to work.” *Stout v. Commissioner, Social Security
 8 Administration*, 454 F.3d 1050, 1053 (9th Cir. 2006) (citing *Dodrill v. Shalala*, 12 F.3d
 9 915, 919 (9th Cir. 1993)).

11 The Ninth Circuit has characterized lay witness testimony as “competent
 12 evidence,” noting that an ALJ may not discredit “lay testimony as not supported by
 13 medical evidence in the record.” *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009)
 14 (quoting *Van Nguyen*, *supra*, 100 F.3d at 1467) (citing *Smolen v. Chater*, 80 F.3d 1273,
 15 1289 (9th Cir. 1996)). Testimony from “other non-medical sources,” such as friends and
 16 family members, *see* 20 C.F.R. § 404.1513 (d)(4), may not be disregarded simply
 17 because of their relationship to the claimant or because of any potential financial interest
 18 in the claimant's disability benefits. *Valentine v. Comm'r SSA*, 574 F.3d 685, 694 (9th
 19 Cir. 2009).

20 Here, the ALJ did not provide any reason to fail to credit fully lay evidence
 21 offered by other non-medical source, Shay's son, or that offered by other medical source,
 22 ARNP Davis. The Court also notes that when rejecting Shay's allegations, the ALJ relied
 23 heavily on a finding that “objective medical evidence fails to support his allegations” (see
 24

1 Tr. 20). However, once a claimant produces medical evidence of an underlying
 2 impairment, the ALJ may not discredit the claimant's allegations "based solely on a lack
 3 of objective medical evidence to fully corroborate the alleged severity of pain," *Bunnell*
 4 *v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*) (citing *Cotton, supra*,
 5 799 F.2d at 1407), and the ALJ may not discredit "lay testimony as not supported by
 6 medical evidence in the record." *See Bruce, supra*, 557 F.3d at 1116 (quoting *Van*
 7 *Nguyen, supra*, 100 F.3d at 1467) (citing *Smolen, supra*, 80 F.3d at 1289).
 8

9 In addition, "where the ALJ's error lies in a failure to properly discuss competent
 10 lay testimony favorable to the claimant, a reviewing court cannot consider the error
 11 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
 12 the testimony, could have reached a different disability determination." *See Stout, supra*,
 13 454 F.3d at 1056 (reviewing cases). If the Court fully credits the testimony of Shay's son,
 14 such as that plaintiff occasionally became delusional, had headaches where he could not
 15 get out of bed; had memory problems and trouble focusing, the Court cannot conclude
 16 with confidence that no reasonable ALJ could have reached a different disability
 17 determination. *See id.*

18 Therefore, the ALJ's review of the lay testimony provided by Shay's son, and the
 19 failure to provide germane reasons for the rejection of this testimony, was harmful error.
 20 This error constitutes an independent reason that this matter should be reversed and
 21 remanded for further consideration.

22 The Court also notes that on January 29, 2003, Shay discussed with his medical
 23 treatment provider, ARNP Davis, the fact that he had been disqualified from a drug trial
 24

1 for manic depression due to a “severe bout of mania” (Tr. 197). His treatment provider
 2 indicated Shay’s report of side effects from taking Lithium, and indicated her assessment
 3 that he suffered from bipolar disorder (*id.*). She also indicated that he did not appear
 4 bothered by his “manic status” (*id.*).

5 In her written decision, the ALJ referenced Shay’s lack of medical treatment as a
 6 factor in her decision regarding the severity of Shay’s impairments and limitations (*see*
 7 Tr. 20), however she failed to discuss the evidence suggesting that the lack of medical
 8 treatment may have had an explanation other than lack of severity of the mental
 9 impairment, such as lack of insight into the need for treatment (*see* Tr. 197). *See* Social
 10 Security Ruling (“SSR”) 96-7, 1996 SSR LEXIS 4, at *21-*22 (“the adjudicator must not
 11 draw any inferences about an individual’s symptoms and their functional effects from a
 12 failure to seek or pursue regular medical treatment without first considering any
 13 explanations that the individual may provide, or other information in the case record, that
 14 may explain infrequent or irregular medical visits or failure to seek medical treatment”);
 15 *cf. Regennitter v. Comm’r SSA*, 166 F.3d 1294, 1296 (9th Cir. 1999) (“Although we have
 16 held that ‘an unexplained, or inadequately explained failure to seek treatment can cast
 17 doubt on the sincerity of a claimant’s pain testimony,’ we have proscribed the rejection of
 18 a claimant’s complaint for lack of treatment when the record establishes that the claimant
 19 could not afford it”) (citations, ellipses and brackets omitted).

20
 21 A person suffering from a mental illness may not realize that he needs his
 22 medication, or he may not even realize that his “condition reflects a potentially serious
 23 mental illness.” *See Van Nguyen, supra*, 100 F.3d at 1465. “[I]t is a questionable practice

1 to chastise one with a mental impairment for the exercise of poor judgment in seeking
2 rehabilitation.”” *Id.* (quoting with approval, *Blankenship v. Bowen*, 874 F.2d 1116, 1124
3 (6th Cir. 1989)).

4 Similarly, the Court notes that plaintiff’s son testified that Shay and his family
5 “didn’t have really time or money to” travel (*see* Tr. 37). Although these discussed
6 treatment notes were provided by a treatment source who is not an acceptable medical
7 source with respect to the ability to diagnose an impairment, information from the record
8 suggests that Shay may not have realized a need for treatment (*see* Tr. 197) or may not
9 have been able to afford any other medical care (*see* Tr. 37.) and it is not proper to reject
10 “a claimant’s complaint for lack of treatment when the record establishes that the
11 claimant could not afford it.” *See Regennitter, supra*, 166 F.3d at 1296; *see also* SSR 96-
12 7, 1996 SSR LEXIS 4, at *21-*22.

14 The ALJ assigned to this matter following remand should develop the record,
15 including utilizing the assistance of a medical expert, as necessary, based on further
16 evaluation of the record, including proper evaluation of the medical and lay evidence.

18 CONCLUSION

19 The ALJ failed to document application of the required method for evaluating
20 mental impairments and failed to provide germane reasons for rejecting lay testimony.

22 Based on these reasons and the relevant record, the undersigned recommends that
23 this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §

1 405(g) to the Commissioner for further consideration. **JUDGMENT** should be for
2 **PLAINTIFF** and the case should be closed.

3 The **Clerk's Office** is directed to change the caption in the Docket and everywhere else
4 relevant to the correct designation of plaintiff, *see supra*, caption (*see also* Complaint, ECF No.
5 5).

6 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
7 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
8 Civ. P. 6. Failure to file objections will result in a waiver of those objections for
9 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).
10 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
11 matter for consideration on October 19, 2012, as noted in the caption.
12

13 Dated this 27th day of September, 2012.

14 
15

16 J. Richard Creatura
United States Magistrate Judge
17
18
19
20
21
22
23
24